American Legal History – Russell

ASKEW vs. DUPREE, 30 Ga. 173 (1860).

In Equity, in Pike Superior Court. Decision by Judge Cabaniss, November Term, 1859.

James F. Dupree and his wife, Uriah E. Dupree, filed their bill in equity against Uriah Askew, for an account of the estate of Mrs. Dupree in defendant's hands, as her guardian, and also to recover the remainder of her distributive share of the estate of her deceased father, in the hands of defendant, as administrator. The bill alleged the marriage of complainants, and the right thereby of said James F., by virtue of said marriage to recover and receive the estate and amount belonging to and due his wife.

To this bill the defendant pleaded in abatement, that complainants were not man and wife, and they were misjoined as complainants. That they were never lawfully married; that the pretended marriage between them was solemnized by A. Buckner, as a minister of the Gospel, but that said Buckner was not at the time of the solemnization of said pretended marriage, a minister of the Gospel of any Christian order or denomination, and was not clothed with any ministerial powers or functions, but had long before that time, to wit: at the August Conference in the year 1855, of the Griffin Baptist church, been deposed from the ministry of said church, and his credentials as such surrendered, cancelled and revoked, and said Buckner excommunicated from said church, by means whereof he became and was totally disqualified to perform marriage rites and ceremonies, and that said marriage was null and void.

To this plea complainants demurred. The court sustained the demurrer, and held the plea insufficient in law.

To which decision counsel for defendant excepted, and assigned the same as an error.

It may be proper to add, that the marriage between complainants was solemnized 25th Dec., 1855, and that a marriage license had been taken out dated 24th Dec., 1855, and upon which was endorsed the following, viz.:

"I certify that Mr. J. F. Dupree and Miss U. E. Askew were duly joined in matrimony by me, this 25th day of December, 1855.

(Signed) "A. Buckner, M. G."

Green & Stewart, for plaintiff in error.

Peeples & Cabaniss, Doyal & Campbell*, contra*.

By the Court.--Lumpkin, J., delivering the opinion. . . .

The conclusions to be deduced from the whole matter are these: That marriage is founded in the law of nature, and is anterior to all human law; that in society it is a civil contract; that if the contract is *per verba de presenti*--that is, I take you to be my wife, and I take you to be my husband--though it be not consummated by cohabitation, or if it be made *per verba de futuro*, and be consummated, it amounts to a valid marriage, in the absence of all municipal regulations to the contrary; and that notwithstanding there be statutes directing a license to issue, as in this State, and inflicting a penalty on any minister or magistrate who shall unite the parties in wedlock, without such license, yet, in the absence of any positive enactment, declaring that all marriages not celebrated in the prescribed form, shall be void; a marriage deliberately and intentionally entered into by the parties, who are able to contract according to the rules of the common law, without conforming to the enactment, is still a valid marriage.

And this is the opinion of Chancellor Kent, 2 *Com*. 90-91; *Judge Reeve, Dom. Rel.* 2 9d., 1857, *note page* 199: *and Prof. Greenleaf*, 2 *Ev.* 513, *and notes*.

In Massachusetts it is provided by statute, that no persons but justices of the peace and ministers of the Gospel shall solemnize marriages; and they only in certain specified cases. And in *Milford & Worcester*, 7 *Mass. Rep.*, 48, it was held, that the parties themselves were precluded from solemnizing their own marriage, and that a marriage by mutual agreement, not according to the statute, was void.

But this opinion, evidently a departure from the general doctrine, and distasteful to the public sentiment, was overruled in the subsequent case of *Parben vs. Harvey*, 1 *Grey's Rep.* 119.

For the policy of this law we are not responsible. It is for the legislature to change it, should it see fit to do so. In this State, no marriage, within our knowledge, has been declared a nullity because the statutory regulations were not complied with, and while the law inflicts penalties upon the celebrator, it has cautiously abstained from interfering with the marriage itself.

For myself, I approve the law as it is. True, it will be sometimes abused. What human institution is not? Rarely, however, will the parties forego the benefits resulting from a compliance with the statutes. It adds so much both to the respectability as well as the security of the contract.

I have never known of a self-solemnized marriage. But suppose such should occur: better, far, for the parties, especially the female, that the law should be as it is. Her honor is saved, and this is worth more than everything, even life itself. All other contracts may be rescinded, and the parties restored to their former condition; marriage can not be undone.

Why does this law, in utter disregard of what seems to be the usual protection and restraint, thrown around the inexperience and imprudence of infancy, allow infants--the male at fourteen and the female at twelve--to enter into the binding contract of marriage? It is at this age the sexual passions are usually developed, and the law, with a wise forethought, looking beyond exceptional cases, and to the general interests of society, to guard against the manifold evils which would result from illicit intercourse, declares even infants capable of forming this relation.

The greatest amount of domestic discontent and discord I have ever known, was produced by a marriage celebrated under a license, regularly issued, and by an officiating magistrate duly authorized to perform the ceremony.

But, I repeat, let our rulers take action upon this most difficult and delicate subject, if, in their judgment, the good of the community demands it. It is a disgrace to the civilization of the age to condemn Courts for the real or imaginary defects of the law.

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